(4)

No. 94-1471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VARITY CORPORATION,

Petitioner,

—v.—

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PETITIONER

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June 23, 1995

QUESTIONS PRESENTED

1. Does the Employee Retirement Income Security Act ("ERISA") § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988), permit individual ERISA plan participants and beneficiaries to sue on their own behalf, and not on behalf of an ERISA plan, for alleged breaches of fiduciary duty under ERISA?

2. When an ERISA-governed welfare benefits plan expressly reserves the right to terminate, amend or modify the plan, and when that reservation of rights is disclosed to plan participants and beneficiaries, may liability nonetheless be imposed under ERISA § 404(a), 29 U.S.C. § 1104(a) (1988 & Supp. V 1993), for breach of fiduciary duty, where an employer fails to disclose its expectation that at some point in the future benefits will be terminated?

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VARITY CORPORATION,

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CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (PA 1a-21a)[1] is reported at 36 F.3d 746. The court's opinion granting petitioner's

[1] References to "PA ___" are to the appropriate pages of the Appendix to the Petition for a Writ of Certiorari. References to "JA _" are to the appropriate pages of the Joint Appendix. References to "Tr. _" are to the appropriate pages of the trial transcript. References to "D. _" are to docket entries in the district court.

motion for clarification of its initial opinion (PA 22a-23a) is reported at 41 F.3d 1263. The district court opinions on post-trial motions (PA 24a-115a) are unreported. A prior opinion of the court below in this case (PA 116a-124a) is reported at 896 F.2d 1107. The court's denial of rehearing with suggestion for rehearing *en banc* is unreported. (PA 125a)

JURISDICTION

Petitioner seeks reversal of the ruling of the court of appeals (PA 1a-21a) filed on September 29, 1994, and clarified on December 8, 1994. (PA 22a-23a) The court of appeals denied a timely petition for rehearing with suggestion for rehearing *en banc* on December 5, 1994. The Petition for a Writ of Certiorari was filed on March 6, 1995, and was granted on April 24, 1995.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

Relevant portions of ERISA are set forth at PA 126a-149a, and are listed in the Table of Contents thereto.

STATEMENT OF THE CASE

This case is about a company that went bankrupt, causing plaintiffs to lose their retiree health benefits. Plaintiffs responded by commencing, for themselves and not for an ERISA plan, an action which ultimately resulted in their being awarded past and future health benefits to which both courts below acknowledged they were not entitled under the written ERISA plan terms.

Factual Background

The litigation arose out of the demise of Massey Combines Corporation ("MCC"), a manufacturer of combines and other farm equipment machinery that went into receivership in Canada in 1988. MCC was created in 1986 when Massey-Ferguson Inc. ("MF"),[2] a farm equipment manufacturer, spun off its Combines and Related Equipment ("CARE") division into a separate company. Respondents are a class of approximately 83 plaintiffs who retired from MCC's United States' operation between 1986 and 1988 and ten individual plaintiffs who retired from MF prior to 1986 whose health benefits were transferred to MCC with other CARE division obligations in 1986. In February 1988, when MCC went into receivership, plaintiffs lost the ERISA welfare benefits MCC had provided. In October 1988, plaintiffs brought this action on behalf of themselves—not on behalf of an ERISA plan—against MF and Varity.

The Applicable Benefits Documents. Prior to 1986, as employees or retirees of MF, plaintiffs were provided welfare benefits pursuant to the MF Benefits Plan (the "Master Plan"). (JA 5-26) Section 7.4 of the Master Plan states unambiguously: "The Company hereby reserves the right, by action of the Board, to amend or terminate the Plan or Trust at any time . . . ." (JA 18)

From the 1970s to 1981, MF provided its employees with a booklet entitled "You and Massey-Ferguson" ("*You & MF*"), which served as a Summary Plan Description ("SPD")[3] for welfare benefits during those years. (PA 66a ¶¶ 71-74) *You &*

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[2] MF, formerly a subsidiary of petitioner Varity Corporation, has been merged into Varity and no longer exists as a separate corporate entity. A statement pursuant to Rule 29.1 of the Rules of this Court is set forth at page iii of the Petition for a Writ of Certiorari. That statement is still accurate.

[3] *See* ERISA §§ 102 *et seq.*, 29 U.S.C. §§ 1022 *et seq.* (1988 & Supp. V 1993); Pension and Welfare Benefits Admin. Regs., 29 C.F.R. §§ 2520.101-1 *et seq.* (1994), as amended.

MF stated at various places that benefits "will continue" in retirement but did not promise unchanged medical benefits and did not "vest" medical benefits in retirement. (PA 9a)

In December 1983, MF announced a significant cutback in the health benefits that it provided to employees and retirees. At that time, MF changed its health coverage from the first dollar coverage described in *You & MF* to a Comprehensive Major Medical Plan (the "CMMP") effective January 1, 1984. (JA 28)[4] In December 1983, MF advised all employees and retirees of the change (JA 31-34, 35-39), and distributed to employees and retirees a detailed memorandum (the "1984 CMMP Memo") describing the new coverage. (JA 39-62; PA 74a ¶ 90)[5]

The CMMP reduced health benefits, requiring higher deductibles and introducing coinsurance. (PA 74a ¶ 90) In addition, the 1984 CMMP Memo made plain that the change in benefits affected not only current employees but also people who had already retired, by stating in the second item (after the "effective date") that retirees, as well as current employees, were included in the "eligible class." (JA 40) Finally, the 1984 CMMP Memo dealt explicitly with the possibility of future changes and MF's unqualified right to make such changes: The 1984 CMMP Memo stated on its schedule of benefits, at the bottom of its second page, in solid capital letters:

> "THE RIGHT IS RESERVED BY THE PLAN ADMINISTRATOR TO TERMINATE, SUSPEND, WITHDRAW, AMEND OR MODIFY THE PLAN IN WHOLE OR IN PART WITH RESPECT TO ANY CLASS OR CLASSES OF COVERED INDIVIDUALS AT ANY TIME." (JA 43)[6]

[4] Earlier reductions to MF benefits dated back to 1981. (PA 73a-74a ¶¶ 87-89)

[5] The 1984 CMMP Memo is set forth in full at JA 39-62, as an attachment to a December 12, 1983 memorandum sent to employees. (JA 35-39) The 1984 CMMP Memo was also attached to a memorandum sent to retirees (JA 31-34), advising them of the change. (*See* JA 33 ("Full details are attached."))

The Decline of the Farm Equipment Machinery Industry in the 1980s and the Creation of MCC. The district court found that "[s]tarting in 1982, there began an unprecedented decline in the sales of combine harvesters in North America, caused in significant part by an extreme depression in this country's agricultural economy." (PA 53a ¶ 12) As the courts below concluded, "[t]he year 1986 was the all-time low for sales of self-propelled combines" (PA 2a); "the entire combine industry was in dire straits." (PA 43a)[7]

Though other divisions of Varity were still profitable, the CARE division suffered significant losses in 1984 and 1985. (PA 53a ¶¶ 13,14) Plaintiffs' expert at trial acknowledged that given the state of the economy, the chances of saving the CARE Division as part of MF under any scenario were very small. (Tr. 3040) The failure of the CARE division threatened to put Varity into breach of its debt covenants. (PA 53a ¶ 14) As the district court found, "Varity's financial position in early 1985 was very precarious." (*Id.*) At trial, plaintiffs' expert agreed that "it would have been very difficult for [Varity] to have survived with the CARE Division. . . . Bankruptcy was a clear possibility." (Tr. 3024-25) Indeed, plaintiffs' expert adopted his earlier statement that "the correct economic decision was to get the hell out of the combine business." (Tr. 3025)

Faced with this economic reality, Varity began to consider the creation of MCC, a separate corporation comprised of

[6] The 1984 CMMP Memo, as the district court found (PA 74a-75a ¶ 92), constituted a summary of material modifications within the meaning of ERISA. *See* ERISA § 102(a), 29 U.S.C. § 1022(a) (1988).

[7] These financial problems affected every United States company in the combine (and related machinery) business (Tr. 2624), and ultimately caused many of those companies to go out of business or to engage in significant corporate restructurings. (Tr. 2626)

MF's CARE division.[8] On May 6, 1986, MCC went into operation as a private Canadian company, ownership of whose stock was divided between Varity, a Canadian bank and the Canadian government. (PA 58a ¶ 35) As plaintiffs' expert acknowledged, the restructuring "saved" Varity (Tr. 3034) and with it the jobs and benefits of 17,500 Varity employees, who were not employed in combines-related businesses. (Trial Exhibit 357)

MCC's Offer of Employment to MF CARE Division Employees. When it was created in 1986, MCC offered employment to all MF CARE division employees on the same terms as MF had provided. Employees were told the following:

> "When you accept employment with Massey Combines Corporation, pay levels and benefit programs will remain unchanged. There will be no loss of seniority or pensionable service. Employment conditions in the future will depend on our ability to make Massey Combines Corporation a success, and if changes are considered necessary or appropriate, they will be made." (JA 82)

A videotaped presentation by MCC's president conveyed the same message. (JA 78-80) MCC also provided employees with a side-by-side chart comparing benefits at MF with those at MCC. That chart specifically referenced the CMMP and asserted that the benefits offered at both companies were identical. (JA 67-73) Finally, MCC provided employees with a question and answer sheet which stated that benefit programs would "remain unchanged" at MCC but that if changes in employment conditions were considered "necessary or appropriate, they will be made." (JA 75-76)

[8] Plaintiffs' expert testified that the only other possibilities were to close the CARE division and liquidate the assets (Tr. 2974), which, of course, would have immediately cost plaintiffs their jobs and benefits, or to sell the CARE division to another company. The expert also testified that "nobody, in my opinion, would have bought the combine division." (*Id.*)

The Benefits Provided By MCC. MF CARE division employees who accepted the offer of employment with MCC thus went to the new company with the understanding that they would receive the same benefits package they had received the day before from their former employer. As fully disclosed to all affected employees, the CMMP had cut benefits for employees and retirees, and the summary of that CMMP had warned both groups of the possibility of further future changes and or termination of benefits in its reservation of rights. The health benefits MCC provided were, in fact, identical: MCC adopted the MF Master Plan and the CMMP as its own and provided the specified benefits while it existed. (PA 76a ¶ 98)[9] Thus, all employees and retirees of MCC (as well as the ten MF retirees whose benefits were transferred to MCC) were governed by the terms of the CMMP as to coverage as well as the reservation of rights that had been fully disclosed in December 1983, long before MCC was even created.

MCC Receivership and the Attendant Loss of Benefits. On March 4, 1988, almost two years after its formation, MCC went into receivership in Canada. (PA 6a) It was forced to terminate its employees, and MCC's receiver sent notice to all MCC employees and retirees advising them that MCC no longer had funds to continue to pay welfare benefits. (PA 52a ¶ 10, 117a)

No Other Representations as to Benefits. From the beginning, there have been disputed facts as to the information provided to MF employees about MCC's future business prospects. The district court concluded that overly optimistic statements were made to employees about MCC's future prospects and insuf-

[9] There is no dispute on this point. The district court found that after the creation of MCC "Varity began to develop 'creative and innovative ways' to reduce employee benefits." (PA 64a) But aside from a reduction in severance pay at MCC that is no longer relevant in this case, the record is clear that MCC did provide the health benefits program MF had offered prior to MCC's creation. It is also clear that Varity was fully entitled under ERISA totally to cut off, let alone reduce, employee health benefits. *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223, 1228 (1995).

ficiently pessimistic statements made about MCC's then-current financial picture. (PA 63a-65a) What is not in dispute is what plaintiffs were told about what their benefits were while at MF and what they would be when they went to MCC. The courts below agreed that the official ERISA plan documents did not provide vested or lifetime welfare benefits. (PA 9a, 35a) There is no finding in this case of any oral or informal written representation or promise that health benefits would continue "for life" or "forever"—either at MF or at MCC. There is no allegation that anyone at Varity represented that health benefits would last any particular length of time at all. And there is no dispute that the reservation of rights was disclosed to all plaintiffs before they lost their benefits.

Procedural History of This Action

A. Initial Proceedings

On October 26, 1988, five former MCC employees initiated this action against MF and Varity under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* (1988 & Supp. V 1993), as amended, in the United States District Court for the Southern District of Iowa. (JA 1; D. 1) Jurisdiction was predicated upon ERISA § 502, 29 U.S.C. § 1132 (1988 & Supp. V 1993) and 28 U.S.C. § 1331 (1988). Plaintiffs sought (i) a permanent injunction ordering MF and Varity to provide a purported class of plaintiffs, consisting of retirees of MCC who had previously worked for MF, with lifetime welfare benefits; (ii) severance pay for certain former employees of MF who worked for MCC at the time it was placed into receivership; and, (iii) punitive damages.

MF and Varity moved to dismiss the complaint, and plaintiffs cross-moved for a preliminary injunction with respect to the retiree plaintiffs' claim for vested welfare benefits. (JA 1; D. 20, 21, 24) On July 14, 1989, the district court issued an order denying the motion to dismiss and granting the motion for a preliminary injunction. (JA 1; D. 47) The preliminary

injunction was reversed by the Court of Appeals for the Eighth Circuit on February 15, 1990, and the case remanded to the district court. (PA 116a-124a)

In its 1990 opinion, the court of appeals did not limit itself to a review of whether the district court had abused its discretion in granting the injunction, but proceeded to "reach the legal issues at the heart of the case." (PA 119a n.3) Welfare benefits plans under ERISA, the court held, may be modified or terminated absent the employer's contractual agreement to the contrary, and plaintiffs had the burden of demonstrating a promise to vest welfare benefits. (PA 119a-120a) "[T]he mere fact that employee benefits continue in retirement does not indicate that the benefits become vested for life at the moment of retirement. No inference of an intent to vest can be presumed from the fact the benefits are retirement benefits." (PA 120a) Because the plan documents at issue contained no promise of vested benefits, and contained a reservation of the right to amend or terminate the benefits, the court held that the retirees "are no longer entitled to these benefits." (PA 121a)[10]

[10] Following the court of appeals' 1990 decision, MF and Varity moved for summary judgment as to all plaintiffs based on the Eighth Circuit's ruling that the retiree plaintiffs were no longer entitled to benefits and based on the governing severance pay plan documents establishing that the severance pay plaintiffs also were not entitled to benefits. The district court initially granted summary judgment in favor of MF and Varity as to the claims of the retiree plaintiffs but, professing confusion as to the meaning of the court of appeals' decision, certified its ruling for interlocutory review. (JA 1; D. 171) The court of appeals denied plaintiffs' application for interlocutory review. (*See* JA 2; D. 184)

Despite having twice failed to persuade the court of appeals of their entitlement to lifetime benefits, plaintiffs moved the district court to reconsider that portion of the order granting summary judgment to the retiree plaintiffs, arguing that the district court's granting of summary judgment did not reflect the court's actual views on the merits, but had been occasioned solely by the court's desire to facilitate interlocutory review. (JA 2; D. 187) The district court agreed; it reversed that portion of its order granting summary judgment as to the retiree plaintiffs' claims of lifetime benefits, allowing those claims to proceed to trial. (JA 2; D. 205)

B. Trial

The district court thereafter allowed two plaintiff classes (MCC retirees and former MCC employees seeking severance pay) and ten individual retirees (who had retired from MF prior to the formation of MCC) to proceed to trial in August 1991 on five legal theories: breach of contract, promissory estoppel, interference with protected rights, breach of fiduciary duty and fraudulent misrepresentation. After a seventeen-day trial, a jury found for plaintiffs on all claims and awarded plaintiffs almost $46 million, including $36 million in punitive damages.[11] Judgment for $45,848,499 was entered on September 30, 1991. (JA 2; D. 356)

C. Post-Trial Orders of the District Court

On March 26, 1993, the district court entered an Order (the "March 1993 Order") and separate Findings of Fact and Conclusions of Law (the "March 1993 Findings"). The district court struck entirely the punitive damage award, acknowledging that punitive damages are not available under ERISA. (PA 113a) The court set aside the jury's award to the severance pay class on all claims—including breach of fiduciary duty (PA 97a-100a)—based on the governing plan documents. As to the retirees, the court dismissed their breach of contract claim seeking lifetime benefits pursuant to ERISA § 502(a)(1), 29 U.S.C. § 1132(a)(1) (1988). The court determined that "[f]or plaintiffs to recover under this count they must show a contract for lifetime benefits which can not be

[11] The district court allowed a jury trial despite the clear caselaw barring jury trials in ERISA cases, *e.g.*, *In re Vorpahl*, 695 F.2d 318 (8th Cir. 1982), law reaffirmed by the court of appeals. (PA 7a n.2) Moreover, the district court allowed the jury to consider evidence relevant to punitive damages, notwithstanding clear caselaw barring recovery of such damages in ERISA cases, *e.g.*, *Dependahl* v. *Falstaff Brewing Corp.*, 653 F.2d 1208, 1216-17 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981). After trial the district court set aside the punitive damages award (PA 113a), a ruling affirmed by the court of appeals. (PA 10a-11a)

terminated. They cannot make such a showing in the face of section 7.4 [the reservation of rights in the Master Plan]." (PA 35a) The court also dismissed as preempted the retirees' claim of fraudulent misrepresentation. (PA 45a)

The district court held, however, that the retiree plaintiffs were entitled to lifetime welfare benefits under three different legal theories. First, the court held that Varity had breached its fiduciary duties in failing to provide lifetime welfare benefits. (PA 89a-97a) The court so held even though the plaintiffs had established no contractual right to recover such benefits under § 502(a)(1) (PA 35a), and even though it had set aside the fiduciary duty claim of those plaintiffs seeking severance pay, based upon the absence of a contractual right in the severance pay plan documents. (PA 97a-100a) Second, the court held that Varity had violated ERISA § 510, 29 U.S.C. § 1140 (1988), which bars interference with the attainment of ERISA-protected rights. (PA 38a-41a) Finally, the court held that petitioner was equitably estopped under federal common law from denying the retiree plaintiffs lifetime welfare benefits. (PA 100a-112a)

In the March 1993 Order, the district court offered the retiree plaintiffs the option to elect either (i) a permanent injunction reinstating them into the MF Plan and "compensatory damages" totalling $779,007.00 (amounting to "actual expenses" borne by the retiree plaintiffs); or, (ii) $8,312,332.00 equalling "damages past and future"—in other words, the equivalent of lifetime benefits—awarded by the jury. (PA 47a, 114a-115a) On April 15, 1993, plaintiffs elected the jury's award of money damages. (JA 3; D. 407)

The Opinion of the Court Below

On appeal, the court below affirmed the district court's March 1993 Order and March 1993 Findings, with some modification as to relief.[12]

[12] The court below set aside the award of compensatory damages for lifetime benefits (elected by the retiree plaintiffs), and substituted for

The court rejected the retiree claims for lifetime benefits under ERISA § 502(a)(1) because "[the plan] language unambiguously confers on the company the right to amend or terminate the Plan." (PA 9a) Nevertheless, the court affirmed the district court's finding of liability as to retirees on the grounds that Varity had breached its fiduciary duties under ERISA § 404(a)(1), 29 U.S.C. 1104(a)(1) (1988 & Supp. V 1993). (PA 17a) The court did this even as it agreed that the severance pay plaintiffs could not sustain their claims (including breach of fiduciary duty) because "[t]he employees' attempt to recover MCC severance benefits from Varity has no support in the language of the [plan document]." (PA 10a)[13]

In three brief paragraphs, the court held that Varity had violated its fiduciary duties to the plaintiffs by misleading them as to the likely future financial viability of MCC. Because Varity itself knew that "MCC had a negative net worth on the day it was created" (PA 5a), and because " '[a]ll of MCC's officers . . . agreed that MCC's chances of survival were not good' " (PA 6a), the court held that the failure to disclose those facts together with the failure to restate that, at some point in the future, the plan might be modified or terminated

it the alternative that plaintiffs had not chosen, and which was not part of the judgment entered by the district court: monetary relief "in the nature of restitution" as well as an injunction reinstating plaintiffs in the MF benefit plan. (PA 18a-19a) Judge Hansen dissented from the panel's opinion on this point, writing that because plaintiffs had elected damages rather than injunctive relief in the district court, the panel had ruled on an issue the parties had not appealed or briefed. (PA 19a-20a) Judge Hansen also dissented based on his view that the restitution ordered by the court for past benefits was an affirmance of the compensatory damages awarded by the district court and thus not properly considered "other appropriate equitable relief" within the meaning of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988). (PA 20a-21a)

[13] The court did not reach the district court's findings of liability predicated upon interference with protected rights and equitable estoppel. (PA 17a-18a n.5)

(PA 4a-5a), was a breach of Varity's fiduciary duties to plaintiffs. (PA 12a-13a, 17a)

The court was less than clear as to exactly why this behavior constituted a violation of *ERISA* fiduciary duties. The court acknowledged that under ERISA "not every business decision made by a fiduciary will subject it to liability for breach of fiduciary duty, even though the decision may detrimentally affect the prosperity of the company, the assets of the plan, or the interests of plan beneficiaries." (PA 12a-13a) The court further acknowledged that Varity's "decision to create MCC and to transfer certain assets to it . . . was not by itself a violation of ERISA." (PA 13a) Starting, however, with the proposition that "the conduct [Varity] engaged in . . . was a breach of fiduciary duty in the generic sense" (PA 12a), the court—without explanation—asserted that Varity's conduct went "beyond mere business decisions." (PA 13a)

The court was silent as to why this was so. It acknowledged that plaintiffs could not recover lifetime benefits (or any benefits) under ERISA § 502(a)(1) because the plan terms unambiguously did not establish any such contractual obligation. (PA 9a) It did not dispute—or even so much as mention—that the reservation of right to amend, modify or terminate the plan had been disclosed to employees and retirees in the 1984 CMMP Memo, a fact found by the district court. (*see* PA 74a-75a ¶¶ 90-92) Nor did the court mention the 1986 documents informing MF employees that "if changes are considered necessary or appropriate, they will be made." (JA 76, 82) Nor, in fact, did the court identify any oral or written misrepresentations as to the terms of the benefit plans or any violations of ERISA's reporting and disclosure provisions. Rather, the court simply invoked the talismanic phrase "duties of loyalty and prudence" to determine that Varity's failure to disclose the likely future business prospects of MCC to its employees and to redisclose the reservation of rights it had previously disclosed in 1984 had constituted " 'misleading communications to plan participants regarding plan administration . . . .' "

(PA 13a, quoting *Berlin* v. *Michigan Bell Telephone Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988).)

Having determined that a breach of fiduciary duty had occurred, the court then held that plaintiffs were entitled under ERISA to recover on their own behalf for that breach. The court located this remedy in ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988), allowing participants and beneficiaries to obtain "other appropriate equitable relief." (PA 16a)

The court determined that ERISA § 404(a)—which sets forth the nature of the duties owed by fiduciaries—could itself provide a claim for a breach of those duties. In so ruling, the court failed to address the impact on this case of this Court's analysis in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134, 140-42 (1985), which determined that ERISA establishes fiduciary duties for the benefit of plans and that a claim for liability for breach of those duties, and the remedies therefor—which are explicitly provided under a separate provision in the statute, ERISA § 409, 29 U.S.C. § 1109 (1988)—can only be brought by a participant or beneficiary on behalf of a plan. Adopting instead "the reasoning in Justice Brennan's concurring opinion in *Russell*" (PA 15a), the court concluded that " '[a] beneficiary therefore may obtain "appropriate equitable relief" whenever an administrator breaches the duties set forth in section 404(a) [29 U.S.C. § 1104(a)].' " (PA 15a, quoting *Russell*, *supra*, 473 U.S. at 153-54 (Brennan, J., concurring in the judgment))[14]

[14] The court below rejected plaintiffs' cross-appeal seeking reversal of the district court's order setting aside the award of punitive damages, the jury's finding of liability as to the severance pay plaintiffs, the jury's finding that petitioner had breached its "contract" to pay benefits pursuant to § 502(a)(1), and the jury's finding of fraudulent misrepresentation. (PA 8a-11a) Plaintiffs have not sought further review of that ruling.

SUMMARY OF ARGUMENT

ERISA, the federal statute resulting from "almost a decade of studying the Nation's private pension plans," *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980), reflects a multitude of careful and deliberate choices by Congress. Among them were decisions as to who may sue to challenge what kind of conduct and the remedies available to aggrieved parties. In this case, the court of appeals abandoned both the text and structure of ERISA, upsetting the carefully crafted balance struck by Congress.

First, by holding that plaintiffs could maintain this suit and could recover benefits for themselves and not on behalf of a plan for breach of fiduciary duty, the court below avoided the text of ERISA and caselaw from this Court interpreting the statute under which recovery for such a breach must be plan-based. In *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985), this Court determined that a plaintiff may bring a civil action for breach of fiduciary duty under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (1988), only on behalf of an ERISA plan, not individually. That ruling was based on the Court's determination that § 409 of ERISA, entitled "Liability for breach of fiduciary duty", which is specifically enforceable through § 502(a)(2), allows only plan-based remedies.

The court below nonetheless permitted plaintiffs in this action to recover on their own behalf for breach of fiduciary duty under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988), which allows recovery of "appropriate equitable relief" for violations of the statute. By allowing plaintiffs to bypass that portion of the statute that expressly addresses the remedies available for breach of fiduciary duty, § 409, via the more general language of § 502(a)(3), the court effectively—and impermissibly—read the plan-based limitation of remedies in § 409 and its enforcement mechanism, § 502(a)(2), out of the statute.

Second, by holding Varity liable for a breach of fiduciary duty in failing to tell plaintiffs of its expectation that their welfare benefits would be terminated at some point in the future, notwithstanding that Varity had already told plaintiffs that it had reserved the right to amend or terminate those benefits, the court vastly expanded the scope of fiduciary obligations on employers beyond those imposed by the statute. The court of appeals' ruling places fiduciary obligations on employers acting in the course of business decisions and not "plan administration", contrary to the statute's definition of "fiduciary", and creates new disclosure responsibilities, not found anywhere in those portions of ERISA that address disclosure obligations. By refusing to give effect to the fully disclosed reservation of rights in the official ERISA welfare plan documents, the ruling renders meaningless ERISA's comprehensive reporting and disclosure scheme under which beneficiaries rely upon written plan documents and specified disclosures, and eviscerates the careful distinction built into the statute between pension benefits which vest and welfare benefits which are terminable at any time.

ARGUMENT

I.

ERISA DOES NOT ALLOW INDIVIDUAL PLAN PARTICIPANTS OR BENEFICIARIES TO SUE ON THEIR OWN BEHALF FOR BREACH OF FIDUCIARY DUTY

The threshold issue in this case is whether ERISA affords a cause of action to individual plan participants and beneficiaries to sue on their own behalf for breach of ERISA-imposed fiduciary duties. The court of appeals held that it does. The court reasoned that since ERISA affords individual participants and beneficiaries the right to sue for "other appropriate equitable relief" under ERISA § 502(a)(3), 29 U.S.C. 1132(a)(3) (1988), plaintiffs could assert claims for breach of fiduciary duty under ERISA § 404(a), 29 U.S.C. § 1104(a) (1988 & Supp. V 1993), not on behalf of the plan itself, but instead on their own behalf and solely for their own benefit. (PA 14a-16a)

The fatal flaw in the ruling below begins with the court of appeals' refusal to recognize that this Court's decision in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985), should be held applicable to *all* claims for breach of fiduciary duty. In *Russell*, this Court held that claims for liability for breach of fiduciary duty under ERISA § 409, 29 U.S.C. § 1109 (1988), could be brought by beneficiaries only on behalf of a plan through § 409's corresponding enforcement provision, ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (1988). Although *Russell* did not address § 502(a)(3), its analysis of the nature of fiduciary duties under ERISA and the remedies provided by Congress for breaches of those duties compels the conclusion that in enacting ERISA, Congress—quite deliberately—chose to enact a specific liability and remedial provision for a fiduciary's breach of duty, § 409, and chose with equal deliberation to provide an equally specific mechanism for obtaining civil redress for the wrongs caused by the breaches, § 502(a)(2).

ERISA, this Court has observed time and again, is a " 'comprehensive and reticulated statute,' " *Russell*, *supra*, 473 U.S. at 146 (quoting *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980)), designed to assure that plan participants and beneficiaries will receive expected benefits, while at the same time recognizing the costs imposed by such regulation as well as the need to encourage employers to offer benefits in the first place. *See Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 54 (1987).[15] In balancing these inter-

[15] As the House Committee on Education and Labor stated, ERISA "represents an effort to strike an appropriate balance between the interests of employers and labor organizations in maintaining flexibility in the design and operation of their pension programs, and the need of the workers for a level of protection which will adequately protect their rights and just expectations." H.R. Rep. No. 533, 93d Cong., 1st Sess. 9

ests, Congress set forth in subchapter I of the statute comprehensive reporting and disclosure requirements, fiduciary obligations, participation, vesting and accrual regulations, substantive rights barring interference with ERISA-protected rights, and, subsequently, imposed certain regulations regarding the continuation of health care coverage after an employee ceased his or her employment.

Congress specifically chose to address ERISA fiduciary issues in Part 4 of Title I of the statute, entitled "FIDUCIARY RESPONSIBILITY". ERISA §§ 401-414, 29 U.S.C. §§ 1101-1114 (1988 & Supp. V 1993), as amended. Part 4 contains ERISA § 404, 29 U.S.C. § 1104 (1988 & Supp. V 1993), entitled "Fiduciary duties". Subsection (a) of that provision sets forth the "[p]rudent man standard of care" under which the fiduciary is required to discharge his or her duties. ERISA § 404(a), 29 U.S.C. § 1104(a) (1988 & Supp. V 1993). In *Russell*, this Court determined that while the obligations set forth in § 404(a) are "to serve the interest of participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan[,] . . . the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest." 473 U.S. at 142-43; *accord Mertens* v. *Hewitt Associates*, 113 S. Ct. 2063, 2066 (1993).

In addition to setting forth these duties, Part 4 of ERISA includes a specific provision, ERISA § 409(a), 29 U.S.C. § 1109(a) (1988), which renders fiduciaries liable for breach of their duties, and provides a particular set of remedies for those breaches. Section 409, unambiguously captioned in the statute "**Liability for breach of fiduciary duty**," provides:

(1973), *reprinted in* Subcomm. on Labor of Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess. *Legislative History of the Employee Retirement Income Security Act of 1974* ("Leg. Hist.") 2348, at 2356 (1976).

> "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title."[16]

ERISA § 409(a), 29 U.S.C. § 1109(a).

In addition to establishing liability for breach of fiduciary duty and the remedies therefor, ERISA sets forth a mechanism that provides the right to initiate civil suits to impose the liability and obtain the remedies set forth in § 409. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (1988), provides that "[a] civil action may be brought . . . by the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 [409] of this title." Section 502(a)(2), as originally enacted, was one of six provisions found in § 502(a) of the statute "empower[ing]" particular persons to bring civil actions under a variety of circumstances.[17] In *Russell* this Court referred to these as "carefully integrated civil enforcement provisions," and noted that they are part of "ERISA's interlocking, interrelated, and inter-

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[16] Section 411 prohibits any person who has been convicted of certain offenses from serving as an administrator or fiduciary of a plan. ERISA § 411, 29 U.S.C. § 1111 (1988).

Part 4 of ERISA also includes a second "liability" provision, which addresses "[l]iability for breach of a co-fiduciary". ERISA § 405, 29 U.S.C. § 1105 (1988).

[17] Since *Russell* was decided, § 502(a) has been amended to provide three additional types of enforcement actions. (The full text of § 502(a) is set forth at PA 148a-149a.)

dependent remedial scheme." *Russell, supra*, 473 U.S. at 146.[18]

Section 409, as enforced through § 502(a)(2), is part of that same "remedial scheme", and its meaning has been settled for a decade. This Court held in *Russell* that under § 409, a participant or beneficiary cannot recover individually, but only on behalf of a plan. There, plaintiff had received all the benefits to which she was entitled under the terms of a plan, but sought damages for the injuries she had suffered due to an administrator's delay in processing her claim for benefits. Asserting that the administrator had breached its duty of care set forth in § 404(a) in delaying to pay her benefits, *see Russell* v. *Massachusetts Mutual Life Insurance Co.*, 722 F.2d 482, 488 (9th Cir. 1983), she brought an action under §§ 409 and 502(a)(2) for breach of fiduciary duty. This Court reversed the Ninth Circuit's determination that she could bring the cause of action on her own behalf.

In so holding, this Court looked to the text of § 409:

> "[W]hen the entire section [409] is examined, the emphasis on the relationship between the fiduciary and the plan as an entity becomes apparent. Thus, not only is the relevant fiduciary relationship characterized at the outset as one 'with respect to a plan,' but the potential personal liability of the fiduciary is to 'make good *to such plan* any losses *to the plan* . . . and to restore *to such plan* any profits of such fiduciary which have

[18] This Court repeatedly has noted that Congress's choices of the specific remedies set forth in § 502(a) were particularly deliberate and careful. "The detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Pilot Life, supra*, 481 U.S. at 54; *see Mertens, supra*, 113 S. Ct. at 2066-67.

> been made through use of assets *of the plan*. . . .' "

473 U.S. at 140 (emphasis in original). The Court's *Russell* analysis, however, was not confined to the text of § 409. It also looked to the "statutory provisions defining the duties of a fiduciary, and the provisions defining the rights of a beneficiary." *Id.* After reviewing these provisions, as well as combing the legislative history of the entire act, this Court noted "*Congress' intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole*," 473 U.S. at 142 n.9 (emphasis added), and that

> "[a] fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary."

473 U.S. at 142.

Notwithstanding *Russell*, the court of appeals in this case permitted plaintiffs to breeze by the plan-based limitations of liability and remedies set forth in § 409 to hold a fiduciary liable to a class of individuals for an alleged breach of the duties set forth in § 404. Under the holding of the court, all any plaintiff must do to maintain a civil action for breach of fiduciary duty—individually and not on behalf of a plan—is to assert a breach of the duties of loyalty in § 404 and run right to § 502(a)(3)'s "appropriate equitable relief" enforcement provision without ever pausing at or demonstrating compliance with § 409. If the decision of the court of appeals is upheld, Congress's considered judgment to limit "liability for breach of fiduciary duty" to specific—and plan-based—remedies under § 409 will be overcome.

Long established and frequently repeated precedent does not permit such a result. "[I]t is a commonplace of statutory

construction that the specific governs over the general . . . ." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). This Court has repeatedly applied that principle, in a variety of contexts, to determine that where a statutory framework indicates that Congress has addressed an issue directly and specifically in one part of a statute, broader general language—even generalized language apparently indicating the existence of "general 'remedies' ", *id.* at 385—will not govern the issue. *Id.* (refusing to read savings clause in Airline Deregulation Act, which preserved state law "remedies now existing at common law or by statute", to "supersede specific substantive pre-emption provision"); *accord, e.g., HCSC-Laundry* v. *United States*, 450 U.S. 1, 6 (1981) (per curiam) (refusing to give effect to general exemptions in Internal Revenue Code subsections that on their face applied to petitioner because a third subsection "expressly concern[ed] the tax status" of petitioner's organization; the latter section was therefore "controlling and exclusive"); *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957) (holding that specific patent infringement venue provision is "sole and exclusive provision controlling venue" in infringement actions despite general language in another portion of statute entitled "[v]enue generally"); *MacEvoy Co.* v. *United States ex rel. Calvin Tompkins Co.*, 322 U.S. 102, 107 (1944) (ruling that general statutory language allowing suits to recover bond deficiencies could not govern over specific limitation granting to subclass right to bring suit); *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932).

This Court has construed ERISA with deliberate care so as to respect *all* its terms and provisions, particularly clauses or provisions intended to limit the scope or nature of the provision at issue. *See, e.g., New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Insurance Co.*, 115 S. Ct. 1671, 1679 (1995) (construing ERISA preemption so as not "to read the limiting language in [that clause] out of the statute, a conclusion that would violate basic principles of statutory interpretation"); *Massachusetts* v. *Morash*, 490 U.S. 107, 114, 115-16 (1989) (construing "vacation benefits" narrowly in definition of ERISA "welfare benefit plan" to include a multiemployer fund created to provide vacation benefits but to exclude broader regular vacation pay in light of other benefits covered in definition); *Mead Corp.* v. *Tilley*, 490 U.S. 714, 723 (1989) (construing "benefits under the plan" in ERISA § 4044(a)(6), 29 U.S.C. § 1344(a)(6) (1988), to mean only "accrued" benefits, given the "elaborate provisions to determine an employee's right to benefits" found in Title I of ERISA; "[i]t is inconceivable that [§ 4044(a)] was designed to modify the carefully crafted provisions of Title I" by creating new entitlements); *Pilot Life, supra*, 481 U.S. at 51-57 (construing savings clause of ERISA preemption clause narrowly in light of ERISA civil enforcement scheme, intended by Congress to be exclusive).

Section 502(a)(3) is devoid of the kind of limiting language set forth in § 409. The former provides that

> "[a] civil action may be brought . . . by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."

ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988). This is the most general of provisions; there is no reference at all—as there is in § 502(a)(2)—to liability for breach of fiduciary duty, let alone to the particular remedies for which it allows recovery.

On the other hand, Congress made a cluster of choices in enacting ERISA's fiduciary provisions: It chose to include a particular provision, § 404, to set forth the duties owed by a fiduciary to participants and beneficiaries. It chose a different—and quite specific—provision, § 409, to establish lia-

bility and the remedies for failure to carry out those duties.[19] Finally, because it concluded that these remedies should be available in civil actions, it chose to include a specific provision, § 502(a)(2), to effectuate that enforcement. It could hardly have done so with the expectation that all those efforts would be swallowed up by the most general language from another provision that does not mention fiduciary duties at all.

In *Russell* itself, this Court rejected a similar effort to read out of ERISA critical portions of its text. There, the plaintiff sought to "read directly from the opening clause of § 409(a), which identifies the proscribed acts, to the 'catchall' remedy phrase at the end." 473 U.S. at 141. This was impermissible because it ignored the "intervening language establishing remedies benefiting, in the first instance, solely the plan." *Id.* at 141-42. Blithely skipping over the remedies in the intervening clauses, this Court held, "would divorce the phrase being construed from its context and construct an entirely new *class* of relief available to entities other than the plan." *Id.* at 142 (emphasis in original). Rather, read with the plan-specific remedies that form the core of the provision, the Court determined that "recovery for a violation of § 409 inures to the benefit of the plan as a whole." *Id.* at 140.

In expounding upon ERISA's legislative history to identify the plan-based nature of ERISA's remedies for fiduciary duty, this Court in *Russell* did not limit itself to congressional pronouncements as to § 409 itself. Rather, the Court cited a long list of examples from committee reports and floor debate to demonstrate generally that "the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and that ERISA was designed to prevent these abuses in the future." *See Russell, supra* 473 U.S. at 141 n.8.

[19] The language of the title of § 409 "Liability for breach of fiduciary duty" is of significance in determining its inherent purport. *Mead Corp., supra*, 490 U.S. at 723.

With these concerns in mind, Congress provided a specific "roadmap" in providing remedies for breach of fiduciary duty. As this Court noted in *Mertens, supra*, 113 S. Ct. at 2066:

> "Fiduciaries are assigned a number of detailed duties and responsibilities, which include 'the proper management, administration, and investment of [plan] assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest.' . . . ; *see* 29 U.S.C. 1104(a). Section 409(a), 29 U.S.C. 1109(a), makes fiduciaries liable for breach of these duties, *and specifies the remedies available against them* . . . ."

Mertens, supra, 113 S. Ct. at 2066 (emphasis added; brackets in original);[20] *cf. Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 69-70 n.6 (1992) (noting that federal courts can sometimes fashion remedies but specifically distinguishing *Russell* which rejected claim involving "statute that expressly enumerated the remedies available to plaintiffs").

Section 502(a)(3) is hardly robbed of meaning under ERISA by reading § 502(a)(2) as the mechanism by which claims for breach of fiduciary duty must be asserted. The former section provides an equitable remedy for violations of numerous regulatory provisions set forth in Title I of ERISA, most of which do not themselves contain specific corresponding remedies. These include equitable relief to enforce compliance with certain of ERISA's reporting and disclosure requirements, ERISA §§ 101-111, 29 U.S.C. 1021-1031 (1988 & Supp. V 1993), as amended, its participation and vesting

[20] *Accord Vespasian* v. *Sweeney*, No. 93-4343, 1995 WL 154982, at *6 n.3 (6th Cir. Apr. 6, 1995) (unpublished disposition); *McLeod* v. *Oregon Lithoprint Inc.*, 46 F.3d 956, 960 (9th Cir. 1995); *Adcox* v. *Teledyne, Inc.*, 21 F.3d 1381, 1390 (6th Cir.), *cert. denied*, 115 S. Ct. 193 (1994); *Simmons* v. *Southern Bell Telephone & Telegraph Co.*, 940 F.2d 614, 617 (11th Cir. 1991); *Horan* v. *Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1418 (9th Cir. 1991); *Bryant* v. *International Fruit Product Co.*, 886 F.2d 132, 135 (6th Cir. 1989); *Sokol* v. *Bernstein*, 803 F.2d 532, 536 (9th Cir. 1986); *Richards* v. *General Motors Corp.*, 850 F.Supp. 1325, 1336-41 (E.D. Mich. 1994) (collecting cases).

provisions set forth in Part 2, ERISA §§ 201-211, 29 U.S.C. §§ 1051-1061 (1988 & Supp. V 1993), as amended, its funding requirements set forth in Part 3, ERISA §§ 301-306, 29 U.S.C. §§ 1081-1086 (1988 & Supp. V 1993), as amended, certain substantive rights set forth in Part 5, such as ERISA's claim for interference with protected rights, ERISA § 510, 29 U.S.C. § 1140 (1988), and certain of the provisions regarding continuation of health coverage, ERISA §§ 601-609, 29 U.S.C. 1161-1169 (1988 & Supp. V 1993), enacted after ERISA, but now part of Title I of the statute. There are thus numerous instances in which an individual participant or beneficiary may properly invoke § 502(a)(3). *See, e.g. Teumer* v. *General Motors Corp.*, 34 F.3d 542, 544 (7th Cir. 1994); *Uselton* v. *Commercial Lovelace Motor Freight, Inc.*, 940 F.2d 564, 582 (10th Cir.), *cert. denied*, 502 U.S. 983 (1991).

ERISA's legislative history confirms that the remedies ultimately placed in § 409 were meant to cover all actions for breach of fiduciary duty. The liability and remedy provision relating to breach of fiduciary duties that ultimately became § 409—including its plan-based language—was included in the very first ERISA bill introduced, H.R. 2, 93d Cong., 1st Sess. § 111 (1973) *reprinted in* Leg. Hist. 3, at 44, and variants of that liability provision—with the same plan-based relief—were included in every single bill introduced thereafter. *E.g.*, S.4 (as introduced), 93d Cong., 1st Sess. § 510 (1973), *reprinted in* Leg. Hist. 93, at 177; S. 1557, 93d Cong., 1st Sess. § 11 (1973), *reprinted in* Leg. Hist. 280, at 313; S. 4 (as reported), 93d Cong., 1st Sess. § 510 (1973), *reprinted in* Leg. Hist. 389, at 572-73.

The "other appropriate equitable relief" provision set forth in § 502(a)(3), on the other hand, first appeared only in the statute as reported out of the Joint Conference Committee, after passage by both Houses of Congress of different bills. H.R. Rep. No. 1280, 93d Cong., 2d Sess. 75 (1974), *reprinted in* Leg. Hist. 4277, at 4350. There is no indication in the Conference Committee Report that the provision was intended to supersede or infringe upon the quite specific remedies imposed under § 409. Precursors of 502(a)(3) did include provision for injunctive relief (not the broader "equitable" relief), *e.g.*, H.R. 9824, 93d Cong., 1st Sess. § 503 (1973), *reprinted in* Leg. Hist. 686, at 769, although such provisions only appeared after both Houses began to include increasingly detailed regulatory provisions, that did *not* have corresponding remedies included in the statute. *Compare e.g.*, H.R. 2, 93d Cong., 1st Sess. (1973), *reprinted in* Leg. Hist. 3-65 (bill containing detailed disclosure and fiduciary provisions but limited vesting and funding provisions; no residual provision) *with* H.R. 9824, 93d Cong., 1st Sess. (1973), *reprinted in* Leg. Hist. 686-777 (bill containing detailed disclosure, fiduciary, vesting, funding, and plan termination insurance provisions; first appearance of residual injunction provision).

In reading the "other appropriate equitable relief" provision of § 502(a)(3) to allow a private—non-plan-based—cause of action, the court below expressed concern that its failure to do so "would leave unredressed an egregious wrong" (PA 16a). The court accordingly adopted Justice Brennan's concurrence in *Russell*, an opinion which relied upon common law principles of trust law and the "promotion of the best interests of participants and beneficiaries," 473 U.S. at 158, to permit individual participants and beneficiaries to assert claims for breach of fiduciary duty on their own behalves. 473 U.S. at 155. The concurring opinion was rooted in Congress's intent to "incorporate the fiduciary standards of trust law into ERISA," *id.* at 152, through the development of federal common law, *id.* at 156, and the "fundamental concept of trust law . . . that courts 'will give to the beneficiaries of a trust such remedies as are necessary for the protection of their interests.' " *Id.* at 157.

There is, of course, no dispute that ERISA incorporates certain principles of trust law, *e.g. Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 111 (1989). Nor is there any dispute

that this Court has indicated that courts may incorporate those general principles in developing a body of federal common law under the statute to fill gaps in left in the statute. *Id.* But, as this Court held in *Mertens*, the authority of courts "to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute." 113 S. Ct. at 2070. And whatever powers federal courts may have to shape federal common law with respect to statutory obligations does not mean "that Congress intended courts to have the power to alter or supplement the remedies enacted." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 645 (1981). This is especially true where the remedies afforded in the statute are detailed and specific; in that case, there is a "sharp distinction between the lawmaking powers conferred in defining violations [of the statute] and the ability to fashion the relief available to parties claiming injury." *Id.* at 644.

The remedies set forth in § 409 are as detailed as they are specific. Moreover, as the legislative history of ERISA indicates, the principles adopted from the law of trusts with respect to § 404 itself were not about remedies at all. Rather, that section "incorporate[d] core principles of fiduciary *conduct* as adopted from existing trust law." S. Rep. No. 127, 93d Cong., 1st Sess. 30 (1973), *reprinted in* Leg. Hist. 587, at 616. On the other hand, the trust law principles enshrined by Congress in ERISA with respect to remedies focused specifically on the remedies set forth in § 409, which abound with the very "plan-based" language that formed the basis of this Court's opinion in *Russell*. *E.g.*, S. Rep. No. 127, 93d Cong., 1st Sess. 30 (1973), *reprinted in* Leg. Hist. 587, at 619.

In crafting its remedy, the court below looked to generalized notions of trust law to read into § 502(a)(3) a remedy that was never intended by Congress under ERISA.[21] Reading the words of § 502(a)(3) in isolation from the full context of Part 4 of ERISA, the court simply ignored the detailed, specific and plan-based remedy of § 409 and § 502(a)(2), rendering those limitations nugatory. The decision below allowing individuals to assert claims on their own behalf for breach of fiduciary duty under ERISA should be reversed.

[21] As this Court stated in *Mertens*:

"[V]ague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration. This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs."

113 S. Ct. at 2071 (citation omitted; emphasis in original).

II.

VARITY WAS NOT ACTING IN ITS FIDUCIARY CAPACITY IN FAILING TO DISCLOSE FACTS CONCERNING THE LIKELIHOOD THAT MCC WOULD BE A SUCCESS

Even if plaintiffs are entitled to maintain individual claims for breach of fiduciary duty under ERISA, the court of appeals' ruling in this case must be reversed because the claimed wrongs are not governed by ERISA fiduciary standards.

The court below awarded retiree plaintiffs welfare benefits, ruling that Varity had breached fiduciary duties under ERISA by misleading plaintiffs as to the future business prospects of MCC and thus as to the risk that they would lose their benefits if they accepted employment at MCC. To support this determination, the court relied upon findings of the district court relating to: (i) misleading statements by Varity to employees that MCC "had a bright future" (PA 3a); (ii) Varity's decision not to provide additional details to employees concerning the risks involved in transferring to MCC (PA 4a); and (iii) Varity's supposed failure to repeat the reserved right to amend or terminate benefits—a right fully disclosed in 1984—upon the creation of MCC. (PA 5a) From these facts, the court concluded that Varity had breached its fiduciary

duties to plaintiffs by making "[m]isleading communications to plan participants regarding plan administration." (PA 13a; citation omitted)

It is noteworthy, at the outset, what the court of appeals did not—and could not—conclude. There was no finding that Varity as plan administrator had misrepresented or not disclosed plan terms as required by the ERISA disclosure provisions, while plaintiffs were at MF or at MCC. There was no reference by the court to the undisputed fact found by the district court that Varity had sent to all plaintiffs the 1984 CMMP Memo, reserving (in capital letters) the right "TO TERMINATE, SUSPEND, WITHDRAW, AMEND OR MODIFY THE PLAN IN WHOLE OR IN PART." There was no finding that Varity had ever orally or informally promised plaintiffs that they would receive benefits forever, or that they could not be terminated at any time. Indeed, based on the reservation of rights in the master plan document, the court below ruled that under the plan terms themselves, plaintiffs were barred from recovering under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (1988), *any* benefits at all, let alone lifetime benefits. (PA 9a (the plan language "unambiguously confers on the company the right to amend or terminate the Plan")) Therefore, a finding that Varity failed to administer the plan in accordance with its terms was as impossible as the conclusion that Varity was acting in the context of "plan administration."

ERISA's statutory scheme plainly contemplates that a person subject to ERISA-imposed fiduciary obligations is not subject to those obligations at all times. The definition of "fiduciary" in ERISA provides:

> "[A] person is a fiduciary with respect to a plan *to the extent* (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) *he has any discretionary authority or discretionary responsibility in the administration of such plan*."

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1988) (emphasis added). *See Mertens, supra*, 113 S. Ct. at 2071 (§ 1002(21)(A) is a "functional" definition). Courts have consistently recognized that employers act both in fiduciary and non-fiduciary capacities because employers who perform fiduciary functions also make business decisions that are not governed by ERISA at all. *See Amato* v. *Western Union International, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985) (employers "assume fiduciary status 'only when and to the extent' that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA"), *cert. dismissed*, 474 U.S. 1113 (1986); *Hozier* v. *Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 (3d Cir. 1990) (an "employer's decision to amend or terminate an employee benefit plan is unconstrained by the fiduciary duties that ERISA imposes on plan administration"). As this Court recently observed, " '[a] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan.' " *Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223, 1228 (1995) (quoting *Adams* v. *Avondale Industries, Inc.*, 905 F.2d 943, 947 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990)).

The issue raised by this case involves the third part of the ERISA definition of "fiduciary"—whether Varity was exercising "discretionary authority or discretionary responsibility *in the administration of a plan*"[22] when, having fully disclosed to plaintiffs its right to amend, modify or terminate

[22] There is no allegation in this case that Varity breached any duty in the exercise of authority or discretionary control over plan assets. Nor is there any allegation that Varity's breach here involved the rendering of investment advice.

welfare benefits, it allegedly did not fully inform plaintiffs as to the likely future financial viability of MCC. Put another way, when Varity urged its employees to transfer to MCC, was it exercising its power to "administer" a plan? If not, under the plain language of the statute, Varity was not acting as a fiduciary.

The mere fact that employers make business decisions that have an adverse impact upon the provision of benefits does not render those decisions ones of plan administration. "Design" or "settlor" functions—decisions as to whether and to what extent to provide benefits—have consistently been distinguished from "administration" functions—running the plan according to its terms. *See Hozier*, *supra*, 908 F.2d at 1159 n.3; *Musto* v. *American General Corp.*, 861 F.2d 897, 911 (6th Cir. 1988) ("There is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be."), *cert. denied*, 490 U.S. 1020 (1989).

Moreover, employers, as this Court recently observed, always retain the general power to terminate ERISA welfare benefits. *Curtiss-Wright*, *supra*, 115 S. Ct. at 1228 ("[E]mployers and other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans."). There is a firm statutory basis for this rule, one noted by this Court in *Curtiss-Wright*. ERISA imposes a variety of complex participation, vesting and accrual requirements *only* upon *pension* plans, not welfare plans. *Id.*; *accord Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983). Thus, under ERISA, pension plans must meet detailed minimum requirements concerning how benefits are to accrue over time. ERISA § 204, 29 U.S.C. § 1054 (1988 & Supp. V 1993), as amended. ERISA further imposes strict rules as to how benefits become vested. ERISA § 203, 29 U.S.C. § 1053 (1988 & Supp. V 1993), as amended. ERISA limits, as well, the ways in which specific vesting schedules can be changed. ERISA § 203(c), 29 U.S.C. § 1053(c) (1988 & Supp. V 1993).

Congress's decision to impose "limitations so meticulously built into the participation and vesting requirements," *excluding* welfare benefits, *Hozier*, *supra*, 908 F.2d at 1161, was the result of a careful balancing of competing interests. In enacting ERISA, Congress was centrally concerned with "promot[ing] the interests of employees and their beneficiaries in employee benefit plans." *Shaw*, *supra*, 463 U.S. at 90. At the same time, Congress recognized that ERISA would impose additional costs on employers, *see* H.R. Rep. No. 533, 93d Cong., 1st Sess. 1 (1973), *reprinted in* Leg. Hist. at 2348, and analyzed "all of the provisions . . . on the basis of their projected costs in relation to the anticipated benefit to the employee participant." *Id.*; *see Mertens*, *supra*, 113 S. Ct. at 2072 (noting " 'tension' " in ERISA between " 'primary goal of benefitting employees and the subsidiary goal of containing pension costs' " and declining to "adjust the balance" by imposing broader fiduciary liability than the statute provides); *see also Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142 (1990) (observing that goal of ERISA preemption clause was to minimize administrative and financial burdens on employers that could work to the detriment of beneficiaries); *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 11 (1987) (noting Congress's recognition that employers might offset inefficiencies by reducing benefits or refraining from offering benefits).

The added costs associated with welfare benefits led Congress carefully—and crucially—to separate them from pension benefits, and to decline to impose upon employers the obligation to offer the former or (as in the case of pension benefits) to require their vesting, funding or accrual. As the Conference Report of the House of Representatives stated:

> "The term 'accrued benefit' refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits, such as medical insurance or life insurance . . . . To require the vesting of these ancillary benefits would seriously complicate the administration

and increase the cost of plans whose primary function is to provide retirement income."

H.R. Rep. No. 807, 93d Cong., 2d Sess. 60 (1974), *reprinted in* Leg. Hist. 3115, at 3180.

Accordingly, it is now well-established that the obligation of employers to provide or continue to provide welfare benefits depends solely upon the terms of the applicable benefits plan documents, and any given beneficiary's entitlement to particular benefits is governed by ordinary principles of contract interpretation. *E.g.*, *Bellino* v. *Schlumberger Technologies, Inc.*, 944 F.2d 26, 29 (1st Cir. 1991); *Moore* v. *Metropolitan Life Insurance Co.*, 856 F.2d 488, 492 (2d Cir. 1988); *Hamilton* v. *Air Jamaica, Ltd.*, 945 F.2d 74, 77 (3d Cir. 1991), *cert. denied*, 503 U.S. 938 (1992); *Gable* v. *Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1442 (1995); *United Paperworkers International Union* v. *Champion International Corp.*, 908 F.2d 1252, 1256-57 (5th Cir. 1990); *Astor* v. *International Business Machines Corp.*, 7 F.3d 533, 540 (6th Cir. 1993); *Ryan* v. *Chromalloy American Corp.*, 877 F.2d 598, 603 (7th Cir. 1989); *Howe* v. *Varity Corp.*, 896 F.2d 1107, 1109 (8th Cir. 1990); *Alday* v. *Container Corp.*, 906 F.2d 660, 665 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991).

An employer need not offer welfare benefits. If it chooses to do so, its obligations to continue to provide them depend solely upon the terms of the plan. In other words, employers are only obligated to provide what they have promised to provide in the written plan documents. *See Curtiss-Wright*, *supra*, 115 S. Ct. at 1228.

ERISA thus quite deliberately affords employers latitude to adjust the provision of welfare benefits as fluctuating costs and business realities dictate. These rules are not only an inescapable necessity given the costs—and the unpredictable nature of the costs over time—of health care benefits; they are an ineluctable part of the balance between promoting the interests of beneficiaries while containing employer costs, a

balance that runs through the entire statute, and the one struck by Congress when it chose to exclude welfare plans from the stringent obligations imposed upon pension plans.

ERISA's fiduciary provision, ERISA § 404, 29 U.S.C. § 1104 (1988 & Supp. V 1993), may not be employed to upset this carefully-crafted balance. The language of § 404 obliges a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries" and "for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." ERISA § 404(a), 29 U.S.C. § 1104(a) (1988 & Supp. V 1993). But the language does not address *when* an employer is acting in a fiduciary capacity. Were this provision held to govern whenever an employer acted to terminate or reduce benefits, the employer could *never* do so, whatever language was included in the plan documents: by definition, any such action could be viewed as contrary to the interests of participants and beneficiaries. *Hozier*, *supra*, 908 F.2d at 1159 ("[I]f an employer's decision whether or not to amend a benefit plan constituted a decision about plan 'administration' . . . , it is virtually impossible to see how [the decision] . . . could pass muster . . . ."). As a result, when the employer makes decisions other than those involved in plan administration itself—even when those decisions unquestionably adversely affect the interests of beneficiaries—the employer acts as plan "settlor" and not in a fiduciary capacity.

Under precisely this same analysis, § 404(a) may not be invoked—as it has been in this case—as a basis for the award of benefits when an employer is accused of failing to warn or misleading its employees about the likelihood that benefits will be changed or reduced in the future—so long as the employer has fully disclosed its right to do so. *See, e.g.*, *Young* v. *Standard Oil (Indiana)*, 849 F.2d 1039, 1045 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988); *Borst* v. *Chevron Corp.*, 36 F.3d 1308, 1323 & n.28 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1699 (1995); *Lea* v. *Republic Airlines, Inc.*,

903 F.2d 624, 631 (9th Cir. 1990); *Blaw Knox Retirement Income Plan* v. *White Consolidated Industries, Inc.*, 998 F.2d 1185, 1190 (3d Cir. 1993).

ERISA's statutory framework addresses and protects an employee's reasonable expectations as to the benefits he or she is entitled to receive under a benefit plan, and it does so in comprehensive detail. But this scheme is "built around reliance on the face of written plan documents." *Curtiss-Wright, supra*, 115 S. Ct. at 1230. Thus, ERISA requires that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1) (1988). The statute also requires that a fiduciary shall "discharge his duties . . . in accordance with the documents and instruments governing the plan ." ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (Supp. V 1993).

Moreover, ERISA sets forth comprehensive and specific rules concerning the kinds of information that plan administrators are required to disclose to employees. ERISA §§ 101-111, 29 U.S.C. §§ 1021-1031 (1988 & Supp. V 1993), as amended.[23] Thus, ERISA requires administrators to furnish to participants a summary plan description, ERISA § 101(a), 29 U.S.C. § 1021(a) (1988 & Supp. V 1993), which "shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." ERISA § 102(a)(1), 29 U.S.C. § 1022(a)(1) (1988). Any summary of "material modification" to a plan must also be disclosed, ERISA § 102(a), 29 U.S.C. § 1022(a) (1988), and must also be "written in a manner calculated to be understood by the average plan participant." ERISA § 102(a)(1), 29 U.S.C.

[23] As early as 1979, this Court recognized that "ERISA requires pension plans to disclose specified information to employees in a specified manner, see 29 U.S.C. §§ 1021-1030, in contrast to the indefinite and uncertain disclosure obligations imposed by the antifraud provisions of the Securities Acts." *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 569 (1979) (citations omitted).

§ 1022(a)(1) (1988). Moreover, plan administrators must disclose certain financial information in annual reports filed with the Secretary of Labor and available to participants upon request. ERISA §§ 103(b)(1), (3), 104(b), 29 U.S.C. §§ 1023(b)(1), (3), 1024(b) (1988 & Supp. V 1993).[24] In none of these (or any other) ERISA reporting and disclosure provisions did Congress require that an employer disclose when it will (or whether it expects to) terminate a plan.

Likewise, ERISA tells plan administrators when to disclose information. Financial reports must be published annually; summary plan descriptions must be furnished within 90 days after an employee first receives benefits (or within 120 days after a plan becomes subject to ERISA); a summary plan description integrating all plan amendments made over the course of a five-year period must be disseminated every five years after a plan becomes subject to ERISA. ERISA § 104(b)(1), 29 U.S.C. § 1024(b)(1) (1988 & Supp. V 1993). Finally,

> "[i]f there is a modification or change [to the plan] a summary description of such modification or change shall be furnished *not later than 210 days after* the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan."

ERISA § 104(b)(1), 29 U.S.C. § 1024(b)(1) (1988 & Supp. V 1993) (emphasis added).

[24] Employers who provide welfare benefits must thus include in their annual reports statements of assets and liabilities; changes in fund balance and financial position; notes to financial statements describing, *inter alia*, "any significant changes in the plan made" during the prior year "and the impact of such changes on benefits"; information concerning loans, transactions, income obligations in default as of the close of the plan's fiscal year and so forth. *See* ERISA §§ 103(b)(1), (3), 29 U.S.C. § 1023(b)(1), (3) (1988).

There is no ERISA-imposed obligation to provide participants with a day-to-day (or even near future) picture of whether an employer intends in the future to terminate benefits. In fact, the statute explicitly contemplates that participants need only be told of changes or reductions in benefits months after they have occurred.[25]

Like the vesting, accrual and funding provisions, Congress enacted the reporting and disclosure requirements fully aware that they imposed additional burdens upon employers. *See* 120 Cong. Rec. 4278 (1974) ("Each regulation has to be weighed against the burdens and pressures it imposes on the system. Each requirement has to be weighed against the cost increase which might result.") (statement of Rep. Perkins), *reprinted in* Leg. Hist. at 3369.[26] Given Congress's keen sensitivity to increased costs, it is telling that nowhere in the statute are employers obligated to describe in advance anticipated plan changes. The statute expressly allows an employer the latitude to change first and disclose later.

This Court's recent decision in *Curtiss-Wright, supra*, strongly supports this analysis. There, this Court reversed the determination of the Third Circuit, which had affirmed an award of benefits on the theory that a reservation of the right to amend or terminate had not constituted a valid amendment procedure under ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3) (1988). In so ruling this Court determined that not only had the reservation of rights satisfied the "plain text" of § 402(b)(3), 115 S. Ct. at 1229, it also rejected plaintiffs'

[25] *See also* 29 C.F.R. § 2520.104b-3 (1994) ("A plan which adopts an amendment which makes a material modification to the plan which takes effect on a date in the future must disclose a summary of that modification within 210 days after the close of the plan year in which the modification or change is adopted.").

[26] *Accord* 120 Cong. Rec. 29, 944-45 (1974), *reprinted in* Leg. Hist. at 4778 (statement of Sen. Long); 120 Cong. Rec. 4295 (1974), *reprinted in* Leg. Hist. at 3411 (statement of Rep. Ullman); 120 Cong. Rec. 4314 (1974), *reprinted in* Leg. Hist. at 3466-67 (statement of Rep. Rostenkowski).

argument that ERISA "guarantee[s] that the [amendment] procedure conveys enough detail to enable beneficiaries to learn their rights and obligations under the plan at any time." 115 S. Ct. at 1230. This Court stated:

> "Respondents are no doubt right that one of ERISA's central goals is to enable plan beneficiaries to learn their rights and obligations at any time. But ERISA already *has* an elaborate scheme in place for enabling beneficiaries to learn their rights and obligations at any time, a scheme that is built around reliance on the face of written plan documents."

115 S. Ct. at 1230 (emphasis in original).

In explaining this scheme, this Court looked specifically to the "comprehensive scheme of 'reporting and disclosure' requirements," 115 S. Ct. at 1230 (including the requirement that summaries of amendments need not be provided until after the amendment has been made, *id.*), and it noted that the purpose of these requirements was "to communicate to beneficiaries the essential information about the plan." *Id.* This Court concluded:

> "This may not be a foolproof informational scheme, although it is quite thorough. Either way, it is the scheme that Congress devised. And we do not think Congress intended it to be supplemented by a far-away provision in another part of the statute, least of all in a way that would lead to improbable results."

115 S. Ct. at 1231 (citation omitted).[27]

[27] *Curtiss-Wright*, like this case, reflects an attempt by plaintiffs to recover retiree welfare benefits where the plan documents established no entitlement to those benefits. In *Curtiss-Wright*, plaintiffs lost their health benefits when Curtiss-Wright shut down the division from which plaintiffs had retired. 115 S. Ct. at 1227. When review of the SPD in that case foreclosed a contractual claim for lifetime benefits, plaintiffs and the lower courts turned to the issue of the validity of the company's plan amendment procedure. *Id.* In the course of rejecting that attempt to

In this case, plaintiffs received all the information concerning their benefits to which Congress had determined they were entitled under ERISA. Plaintiffs were told before they transferred to MCC that under the benefits plan the plan administrator had the right to amend, modify or terminate their health benefits at any time. They were given this information in the context of a reduction in benefits applicable to employees and retirees. The court of appeals did not even mention this fact, or suggest that plaintiffs had not been so advised. It did not impose liability based upon any misrepresentation of plan terms or any violation of ERISA's reporting and disclosure provisions. The court held, in fact, that on the face of the written plan documents, plaintiffs were *not* entitled to recover benefits. (PA 9a) *See Curtiss-Wright, supra*, 115 S. Ct. at 1230.

The court of appeals found that Varity misled employees as to MCC's chances of success. But this does not provide any cognizable statutory basis for imposing liability. The court recited facts that it considered an "egregious wrong" (PA 16a); it determined that these facts went "beyond mere business decisions" (PA 13a); but it could not begin to explain how Varity's behavior had entered the realm of "plan administration."[28] Whether Varity violated the "duties of loyalty and

recover benefits where they were not promised, the Court also indicated that the breach of fiduciary duty approach would be similarly unavailing in the pursuit of welfare benefits. *Id.* at 1228.

[28] The line of cases relied upon by the court below (PA 12a-13a) are similarly flawed. Those cases pay lip service to the notion that an employer can make business decisions that adversely affect benefits without being limited by ERISA's fiduciary obligations. *E.g., Berlin, supra*, 858 F.2d at 1163. But they go on to hold—without any analysis of the comprehensive disclosure scheme discussed in text above—that if an employer has given "serious consideration" to a change in benefits and not disclosed it, the employer is to be held liable. Indeed, some of these cases have inaptly likened the duty of disclosure to that imposed by the federal securities laws. *See, e.g., Fischer* v. *Philadelphia Electric Co.*, 994 F. 2d 130, 135 (3d Cir.) (citing *Basic Inc.* v. *Levinson*, 485 U.S. 224, 232-41 (1988) and *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438,

prudence described in 29 U.S.C. 1104" (PA 13a) is hardly the issue if Varity did not owe those duties when it contemplated its own future conduct and its obligations to its employees.

The very nature of ERISA dictates reversal here. In determining that the acts of Varity held actionable were undertaken in its fiduciary capacity, the court below circumvented ERISA's definition of "fiduciary" by simply invoking the talismanic phrase "duties of loyalty and prudence" (13a) to find that Varity was required to disclose its expectation that plaintiffs would ultimately lose benefits.[29] In so doing, the court not only begged the central question of whether Varity *owed* fiduciary duties at the time of its challenged conduct but ignored the actual statutory obligations imposed upon Varity by the statute. The court did this without addressing how such a duty of disclosure could possibly exist where Varity was concededly permitted to terminate the plan altogether; and without finding any violation of, or even mentioning, the detailed disclosure requirements set forth in the statute. In ruling that Varity acted as a fiduciary, the court frustrated the balance struck by Congress between the obligations of employers to comply with ERISA's disclosure provisions and the desirability of creating incentives for employers to offer welfare benefit plans in the first place.

449 (1976)), *cert. denied*, 114 S. Ct. 622 (1993). That analogy has been rejected by this Court. *See International Brotherhood of Teamsters, supra*, 439 U.S. at 569 (discussed at note 23 *supra*).

[29] *Compare Young, supra*, 849 F.2d at 1045 ("[t]hough perhaps desirable in normal business conduct, Amoco owed no legal duty to reveal that it intended to create a special severance plan for the divestiture of" failing division); *Borst, supra*, 36 F.3d at 1323 n. 28 (employer's "statements [misrepresenting intent not to set aside plan reserves] were not shown to be made in its fiduciary capacity, as opposed to being statements of intended action in its corporate nonfiduciary capacity"); *Lea, supra*, 903 F.2d at 631; *Blaw Knox, supra*, 998 F.2d at 1190.

CONCLUSION

The ruling of the court of appeals should be reversed to the extent it affirmed liability against Varity.

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